



In the Matter of:

U.S. DEPARTMENT OF STATE

ARB CASE NO. 98-114

*In re: Appeal of Rejection of Department
of State Request for Substantial Variance
Hearing and Request for Arm's-Length
Negotiation Determination Wage Determination
Notice No. 98-0135 (3/12/98) Contract No.
S-OPRAQ-96-D-0569*

DATE: February 16, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Dennis J. Gallagher, Esq., *U.S. Department of State, Rosslyn, Virginia*

For the Respondent:

Joan Brenner, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Henry J. Solano, Esq., *U.S. Department of Labor, Washington, D.C.*

For Intervenor Inter-Con Security Systems, Inc.:

Neil H. O'Donnell, Esq., Patricia A. Meagher, Esq., *Rogers, Joseph, O'Donnell & Quinn, San Francisco, California*

For Intervenor United Plant Guard Workers of America:

Lisa S. Lane, Esq., *Gregory, Moore, Jeakle, Heinen, Ellison, Brooks & Lane, P.C., Detroit, Michigan*

FINAL DECISION AND ORDER

On January 23, 1998, Petitioner United States Department of State (State Department) requested the Acting Administrator, Wage and Hour Division (Administrator), to convene hearings to determine whether a December 1997 collective bargaining agreement (labor agreement or CBA) between Inter-Con Security Systems, Inc. (a State Department service contractor) and the United Plant Guard Workers Union of America (UPGWA) was negotiated at arm's-length and whether the negotiated wage rates contained in the labor agreement were "substantially at variance" with the locally prevailing wage rates for similar work, within the

meaning of the McNamara-O’Hara Service Contract of 1965, as amended (SCA or Act), 41 U.S.C. §351 *et seq.*; *see* 41 U.S.C. §353(c). The hearing requests were submitted to the Administrator *after* the service contractor began to perform work on an option year of its service procurement contract (*i.e.*, after January 6, 1998); thus, the State Department’s request for these hearings was untimely under the regulations implementing the SCA. 29 C.F.R. §§4.10(b)(3)(ii), 4.11(b)(2)(ii)(1998). However, these same regulations provide that even if hearing requests are not filed within the specified time limitation, the Administrator may convene so-called “arm’s-length” or “substantial variance” hearings if the Administrator “determines that extraordinary circumstances exist.” *Id.*

In a final ruling issued March 24, 1998, the Administrator denied the request for hearings, concluding that the State Department had failed to demonstrate that there were extraordinary circumstances that would justify waiving the requirement to file requests for arm’s-length and substantial variance hearings prior to the commencement of contract performance in cases where, as here, a follow-up option period to a contract was concerned. *Id.* The State Department petitioned for review by the Administrative Review Board.

On appeal to this Board, the Administrator argues that the phrase “extraordinary circumstances” in the regulations refers specifically to situations in which a party (such as the State Department) becomes aware of the terms of a new collective bargaining agreement so late that there literally is insufficient time to file a timely request for hearings. In the Administrator’s view, the facts in this matter demonstrate that the State Department had sufficient time to perfect its hearing requests in a timely manner, but failed to do so.

In this case, the Board must determine whether the Administrator’s interpretation of the term “extraordinary circumstances” in the SCA regulations governing substantial variance and arm’s-length hearings is correct in light of the facts presented on the record and applicable legal precedent. The Board has jurisdiction to decide the issues presented pursuant to the Act and the implementing regulations at 29 C.F.R. Parts 4 and 8.

For the reasons discussed below, we conclude that the Administrator’s March 24, 1998, final ruling is in accordance with the Act and the regulations. We therefore deny the Petition for Review and affirm the Administrator’s final ruling.

BACKGROUND

I. Overview of the SCA’s wage determination procedures and substantial variance and arm’s-length bargaining hearing procedures

The SCA generally requires that every contract in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of service employees in the United States, must contain a provision which specifies the minimum hourly wage and fringe benefit rates which are payable to the various

classifications of service employees working on such a contract. *See* 41 U.S.C. §§351(a)(1), (a)(2). These wage and fringe benefit rates are predetermined by the Wage and Hour Division acting under the authority of the Administrator, who has been designated by the Secretary of Labor to administer the Act.

Under the Act, there are two types of SCA wage schedules – also known as wage determinations – which are prepared for inclusion in service contracts. The first type is a general wage determination, and the wages and fringe benefits contained in such a schedule are based on the rates which the Wage and Hour Division determines prevail in the particular locality for the various classifications of service employees to be employed on the contract. 41 U.S.C. §351(a)(1) and (2). These wage determinations sometimes are referred to as “prevailing in the locality”-type wage determinations.

A second type of wage determination is issued at locations where there is a collective bargaining agreement between the service employees and an employer working on a Federal service procurement. Under these circumstances, the Wage and Hour Division is mandated under the SCA to specify the wage and fringe benefit rates from the collective bargaining agreement (including prospective increases) as the required minimum rates payable to the service employee classifications to be employed on the procurement contract. *Id.* In addition, Section 4(c) of the Act requires generally that the negotiated wage rates (and prospective increases) must be incorporated into a successor contract’s wage determination in those instances where a labor agreement has been negotiated between the service employees and a contractor’s predecessor. 41 U.S.C. §353(c).

Section 4(c), however, contains provisions that restrict the applicability of CBA-based wage and fringe benefit rates in wage determinations:

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of *arm’s length negotiations*, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are *substantially at variance with those which prevail for services of a character similar in the locality*.

41 U.S.C. §353(c) (emphases added). As interpreted by the Secretary under the SCA regulations, the successorship provisions of Section 4(c) quoted above are subject to two limitations, both of which involve hearings before Department of Labor Administrative Law Judges.

First, collectively-bargained wage rates may only be incorporated into a covered service contract if such rates were reached “as a result of arm’s-length negotiations” *Id.* A challenge to the *bona fides* of a collective bargaining agreement can be brought by requesting a so-called “arm’s length hearing.” *See* 29 C.F.R. §4.11. The purpose of an arm’s-length proceeding is to determine whether a CBA containing negotiated wage and fringe benefit rates was reached by willing signatories, avoiding “collusive arrangements intended to take advantage of the SCA scheme.” 48 Fed. Reg. 49740 (Oct. 27, 1983).

Second, the Section 4(c) proviso of the SCA states that wages and fringe benefits contained in a CBA shall not apply to a service contract “if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.” 41 U.S.C. §353(c). Therefore, the collectively-bargained wage or fringe benefit rates negotiated between a Federal service contractor and the union representing its employees may not be applied to a successor procurement period if, following a challenge and hearing, it is determined that the negotiated wages are substantially different from locally-prevailing rates for similar work. *See* 29 C.F.R. §4.10.

The regulations governing requests for arm’s-length and substantial variance hearings include explicit procedural time limitations for filing hearing requests. For example, the substantial variance hearing provision states:

(b)

* * *

(3) . . . [R]equests for a hearing shall not be considered unless received as specified below, *except in those situations where the Administrator determines that extraordinary circumstances exist:*

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) *For negotiated contracts and for contracts with provisions extending the initial term by option,*

*prior to the commencement date of the contract or
the follow-up option period, as the case may be.*

29 C.F.R. §4.10(b)(3) (emphases added). The time limitation provisions for requesting arm's length hearings are the same. *See* 29 C.F.R. §4.11(b)(2). Therefore, in order for a contracting agency's substantial variance or arm's-length hearing request to be considered timely in connection with a multi-year contract about to enter a new option year, the request ordinarily must be made prior to the commencement date of the follow-up option period.

II. Factual and procedural background

The State Department awarded a contract to provide security services to Inter-Con Security Systems, Inc. (Inter-Con) in the latter part of 1996 (Contract No. S-OPRAQ-96-D-0569)(the Contract). The Contract called for Inter-Con to provide security guard and protective services at several federal facilities at various locations, including (a) the main Department of State office building and Department annexes in the National Capital Region (D.C. - Md. - No. Va.); (b) the U.S. Mission to the United Nations, Ambassador's Residence at the Waldorf-Astoria Hotel and the Passport Office, New York City; (c) the National Passport and Visa Centers in Portsmouth, New Hampshire; (d) the U.S. Passport Offices in Los Angeles and San Francisco, California; (e) and State Department offices in Charleston, South Carolina. Administrative Record (AR)^{1/} Tab G, p. 48. Inter-Con was the lowest bidder among three finalists in the procurement process. AR Tab H, p. 264.

The first year of the Contract was to conclude on January 5, 1998, and a new one-year option period was to commence on January 6, 1998. On December 5, 1997 – about one month before the new procurement year was scheduled to begin – Inter-Con entered into a collective bargaining agreement with UPGWA and its affiliated Local 285.^{2/} AR Tab E, pp.

^{1/} In this decision, citation to additional documents contained in the record before the Board are abbreviated as follows:

Pet.	Petition for Review
Pet'r Rep. Brf.	Petitioner's Reply Brief
Adm'r Stmt.	Statement of the Acting Administrator in Response to Petition for Review
Inter-Con Brf.	Statement of Intervenor Inter-Con

^{2/} It appears that the parties to the CBA were "Inter-Con UPSP Services Corporation," the UPGWA and Local 285. *See* AR Tab G, pp. 57, 75; AR Tab H, pp. 244, 262. However, early versions of the CBA identified the signatory union as Local 158. AR Tab G, p. 59; AR Tab H, p. 246. In
(continued...)

25-42. The CBA was to run from December 5, 1997, through January 4, 2002. The new labor agreement established terms and conditions of employment – including wages and fringe benefits – for Inter-Con’s employees at all of the State Department Contract locations. Wage rate increases were provided under the CBA for three succeeding contract years. Inter-Con notified the State Department that it had negotiated the collective bargaining agreement with UPGWA that same day, *i.e.*, on December 5, 1997. *Id.*^{2/}

Article 15 of the CBA listed the position classifications for Inter-Con security employees at the various Contract locations throughout the country, with different wage rates required in each locality. The effective date of the new wage rates was January 5, 1998. *Id.*, pp. 40-41. Article 18 specified a uniform rate of health and welfare fringe benefits for all employees, regardless of location or classification. *Id.*, p. 42. The State Department avers that the CBA “provided wage increase [sic] of 20% over existing Service Contract Act Area Wage Determinations effective January 5, 1998, the day before the first option period was to begin.” Pet’r Rep. Brf., p. 3.

On December 11, 1997, the State Department wrote to Inter-Con, informing the contractor that the copy of the CBA forwarded on December 5, 1997, had not included signatures of Inter-Con’s and UPGWA’s representatives. AR Tab G, p. 187; *see also* AR Tab E, p. 43. Also, in that December 11 communication to Inter-Con, the State Department requested additional information from the contractor. First, a signed copy of the CBA was requested. In addition, the State Department requested information concerning the authority of UPGWA to act as the representative of Inter-Con’s employees. The State Department also requested a statement of the contractor’s position concerning which of the CBA position classifications constituted “service employees” who would be covered by the labor standards provisions of the SCA. Finally, the State Department queried whether Inter-Con “believe[d]” that the negotiated wage rates were not at substantial variance from locally prevailing wages and whether the CBA had been reached as a result of arm’s-length negotiations. AR Tab G, pp. 187-188.

On December 16, 1997, Inter-Con responded by letter to each of the State Department’s inquiries. AR Tab G, pp. 133-186, 189-195. In one of the two responses, Inter-Con included a signature page from the CBA and addressed the questions that had been

^{2/}(...continued)

addition, there appear to be slight differences between the unsigned CBA supplied to the State Department in early December and the version that finally was executed. *Compare* AR Tab E, pp. 40-41 and AR Tab H, p. 258.

^{3/} The State Department alleges that Inter-Con “did not provide a signed copy of the final agreement until December 19[, 1997].” Pet’r Rep. Brf., p. 4. However, it appears that an unsigned version of the CBA was forwarded to the State Department on December 5, 1997. Inter-Con Brf., p. 2; AR Tab E, pp. 25-43.

posed by the State Department. AR Tab G, pp. 189-195. With regard to the union's authority to negotiate a labor agreement, Inter-Con asserted that UPGWA had presented authorization cards signed by a majority of its employees, and that the company recognized the union as the employees' exclusive bargaining agent under the National Labor Relations Act based on this expression of interest. With regard to whether some positions under the Contract might not be covered under the Service Contract Act, Inter-Con suggested to the State Department's contracting officer that the Department of Labor was in the best position to make determinations of which employees under the Contract would be considered "service employees" within the meaning of the SCA. In response to the State Department's claim that the new wage rates were too high, Inter-Con expressed its opinion that the wage rates under the earlier wage determination had been substandard, leading to high employee turnover, and that the CBA's new negotiated rates brought the wage standards into proper alignment with rates in the community and therefore were not at "substantial variance" with locally prevailing wages. Finally, Inter-Con asserted that the CBA had been reached as a result of arm's-length negotiations, and that the speedy negotiation actually was advantageous to the State Department when compared with Inter-Con's experience with a prolonged labor negotiation on a security contract covering guards at nuclear power plants. *Id.*, pp. 189-192.

Inter-Con's second submission to the State Department on December 16, 1997, supplied the agency with the proposed contract modification, which would take into account the increased wage rates that would be paid under the new labor agreement. AR Tab G, pp. 133-186. As part of this package, Inter-Con provided a detailed comparison between the wage rates paid under the first year of the security services contract and the rates that would be paid during the second year under the new CBA with the union. Notably, this data even included tables showing the wage increases for each job classification (characterized by Inter-Con as "variances"). *Id.*, pp. 152-154.

The option year of the contract commenced on January 6, 1998. On January 12, 1998, the State Department requested the Wage and Hour Division to issue wage determinations based on the hourly wage and fringe benefit rates contained in the Inter-Con/UPGWA labor agreement. The requested wage determination was provided to the State Department on March 12, 1998.

However, during the time period between requesting and receiving the CBA-based wage determination, the State Department submitted a request to the Wage and Hour Division on January 23, 1998, seeking hearings to determine whether the negotiated wage rates were at substantial variance from locally prevailing rates and whether the CBA had been reached as a result of arm's-length negotiations. AR Tabs G, H. Responding on behalf of the Wage and Hour Administrator, on March 24, 1998, the National Office Program Administrator of the Wage and Hour Division denied both of the State Department's requests for hearings. *See* AR Tab A. The Administrator noted that under the Act's regulations, the State Department's requests were untimely, given that the implementing regulations require

that such hearing requests be submitted – in the case of follow-up contract option periods – prior to the commencement of the option period. The Administrator also noted that the SCA regulations permit waiver of the timeliness requirements only upon a showing of “extraordinary circumstances.” Without elaboration, the Administrator stated that “[n]one of the facts discussed in your request constitute extraordinary circumstances and thus we must reject your request concerning this option period as untimely.” *Id.*, p. 1.

The State Department filed a Petition for Review on April 13, 1998, seeking reversal of the Administrator’s final ruling. Both Inter-Con and UPGWA intervened before the Board as “interested parties” within the meaning of the Board’s regulation at 29 C.F.R. §8.12,^{4/} and filed statements in support of the Administrator’s final determination of March 24.

III. Developments after the Petition for Review was filed

In a Reply Brief dated July 2, 1998, the State Department submitted new materials that were not included in the official administrative record of the case and “ask[ed] that the Board consider additional information presented herein that was not available to the [State Department] when its Appeal was filed.” Pet’r Rep. Brf., p. 7. The “additional information” concerns further developments relating to the Inter-Con/UPGWA CBA that arose *after* the filing of the Petition for Review in this matter. Specifically, the State Department brought to our attention the fact that, as the result of a proceeding before the National Labor Relations Board (NLRB) in which the NLRB found that the union had not achieved majority status at the time it negotiated the CBA with Inter-Con on December 5, 1997, “Inter-Con has agreed with the National Labor Relations Board . . . to withdraw its recognition of the UPGWA and its affiliated Local Union No. 285 as a result of technicalities in the union process.” *Id.*, Attachment 1. However, despite the requirement that Inter-Con withdraw recognition of the UPGWA, the NLRB settlement also provided that “nothing contained [in the settlement] shall be construed as permitting [Inter-Con] to vary the wages, hours, seniority, or other substantive terms of employment established in the contract or to prejudice the assertion by [Inter-Con] employees of any right that they may have thereunder.” *Id.*, Attachment 5.

On July 9, 1998, Inter-Con filed a “Motion to Strike Immaterial Matters from the Reply Brief of Petitioner United States Department of State” (Motion), requesting that the Board strike from the record the State Department’s arguments and attachments contained

^{4/} The term “interested party” is defined in the regulation at 29 C.F.R. §8.2(b)(1) to include any “employee or any labor organization which represents an employee who is likely to be employed or to seek employment under a contract containing a particular wage determination, or any contractor or an association representing a contractor who is likely to seek a contract or to work under a contract containing a particular wage determination.” As, respectively, the service contractor and the labor organization for the State Department’s security services contract, Inter-Con and UPGWA are interested parties.

in the Reply Brief which pertained to the history of the CBA and the NLRB settlement. UPGWA joined in Inter-Con's Motion to Strike in a statement filed on July 17, 1998.

DISCUSSION

In this Discussion, we first consider the core issue before the Board in this matter, *i.e.*, the correct interpretation of the term "extraordinary circumstances" in the SCA regulations that authorize the Administrator to order "arm's-length" or "substantial variance" hearings even when the hearing requests are untimely. In the second section of the Discussion, we consider the State Department's request that the Board consider supplemental NLRB materials not previously reviewed by the Administrator which raise questions concerning the lawfulness of the negotiations between Inter-Con and UPGWA and the validity of the resulting labor agreement.

I. Whether the Administrator erred in concluding that there were no "extraordinary circumstances" in this case justifying an exception to the time limitations for filing arm's-length or substantial variance hearing requests

A. *Interpreting the term "extraordinary circumstances" in the regulations*

As noted above, a request for arm's-length or substantial variance hearings made in connection with the exercise of an option in a multi-year procurement contract must be submitted to the Administrator *prior* to work commencing on the option period, *unless* the Administrator finds that extraordinary circumstances justify a waiver of the time limitation. In this case, the State Department became aware of the new CBA between Inter-Con and the union on December 5, 1997, when it received an unsigned copy of the document. A signed version was supplied on December 16, 1997. The option year commenced January 6, 1998. The hearing requests were not made until January 23, 1998, *after* the option period had begun.

In its Petition for Review, the State Department argues that the Administrator erred in not finding that extraordinary circumstances prevented it from requesting the substantial variance and arm's-length hearings in a timely manner. The State Department asks that the Board reverse the Administrator's finding that no extraordinary circumstances existed and direct the Wage and Hour Division to set these matters for hearing by an administrative law judge.

In advocating their respective positions, the parties have taken disparate approaches in arguing the meaning of the regulatory term "extraordinary circumstances." The Administrator asserts that the State Department had ample time in which to file timely hearing requests. In the Administrator's view, extraordinary circumstances cannot be demonstrated on this record because the State Department had sufficient information in its

possession early enough to meet the regulatory time limitation and “has stated no fact or condition that prevented it from filing its requests for hearings within the regulatory timeliness strictures.” Adm’r Stmt., p. 7. Thus, the Administrator views “extraordinary circumstances” as referring primarily to issues involving time.

In making his legal argument linking the term “extraordinary circumstances” closely to time considerations, the Administrator uses a somewhat complicated and convoluted analysis, analogizing the term “extraordinary circumstances” used in the SCA regulations to the court decisions interpreting Rule 60(b) of the Federal Rules of Civil Procedure, which establishes the circumstances under which a court may order relief from the operation of a judgment, order or proceeding. The Administrator notes that Rule 60(b)(6), in particular, provides that a party may be relieved from the action of a federal court “where justice so requires.”^{5/} *United States ex rel. Familian Northwest, Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994). According to the Administrator, interpretative case precedent makes clear that Rule 60(b)(6) may be successfully invoked only where there are “extraordinary circumstances” which support the granting of relief from a final judgment or order in the interest of justice. *Ackerman v. United States*, 340 U.S. 193, 203 (1950). While the “extraordinary circumstances” concept associated with Rule 60(b)(6) may seem to be an open-ended “catchall” provision, a party seeking relief from finality of a judicial or administrative order or judgment must, at a minimum, posit facts or allegations which “set up an extraordinary situation which cannot fairly or logically be classified as mere ‘neglect’.” *Klapprott v. United States*, 335 U.S. 601, 613 (1949).

On the other hand, the State Department contends that the Board should “take a less restrictive view of when ‘extraordinary circumstances’ warrant waiver of the ordinarily applicable time limits in the interests of justice.” Pet’r Rep. Brf., p. 5. The State Department argues, in effect, that all of the “facts” surrounding the procurement and award of the Contract – e.g., the State Department’s suspicions regarding the alleged lack of arm’s-length negotiations between the employer and the union, and the allegedly sizeable difference between Inter-Con’s negotiated wage rates and the rates previously issued in the Labor Department’s SCA general wage determinations – constitute “extraordinary circumstances” within the meaning of the Act’s regulations. In the State Department’s view, the circumstances surrounding the negotiated wage rates therefore justify this Board reversing the Administrator’s denial of the requested hearings in the first instance. Moreover, the State Department asserts that its seven-week delay in

^{5/} Other provisions of Rule 60(b) establish additional grounds for relief from a final judgment or order: “(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged” Fed. R. Civ. Proc. 60(b)(1)-(5). The State Department has not alleged and the record does not support a conclusion that any of these bases for relief from judgment would be applicable in this matter before the Board.

requesting hearings does not result in prejudice to any of the parties, further justifying a decision by this Board ordering a hearing. *Id.* Thus, the State Department would have the Board focus on the underlying merits of its claim when deciding whether a waiver of the time limits for “extraordinary circumstances” is warranted, as well as its claim that it lacked sufficient information concerning the alleged substantial variance until sometime in January 1998.

Because we conclude that the term “extraordinary circumstances” in 29 C.F.R. §§4.10(b)(3) and 4.11(c)(3) relates specifically to whether or not a complainant literally had adequate information within sufficient time to file a request either for arms’-length or substantial variance hearings, we conclude that the Administrator’s conclusion that no “extraordinary circumstances” were presented in this case is the better of the two positions. However, we decline to adopt the Administrator’s approach to analyzing the term and its application in this matter.

We commence our analysis with a brief discussion of our authority to review the final decisions of the Administrator. The Board has previously observed that our review of the Administrator’s rulings is somewhat limited by the nature of the Department of Labor’s SCA administration as established under the Act and its regulations at 29 C.F.R. Parts 4 and 8. The Administrator – as the Secretary of Labor’s delegate – is charged with administering the Act, including the promulgation of its regulations and its enforcement. As such, the Administrator is generally accorded considerable deference in interpreting and applying the Act’s regulations as a matter of first resort. Thus, we have noted that “the Administrator is given broad discretion and his or her decisions will be reversed only if inconsistent with the regulations, or if they are ‘unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations’” *COBRO Corp.*, ARB Case No. 97-104, July 30, 1999, slip op. at p. 11 (quoting *Titan IV Mobile Service Tower*, Wage Appeals Board^{6/} (WAB) Case No. 89-14, May 10, 1991).

In this case, we are presented with the question of whether the Administrator’s interpretation of the term “extraordinary circumstances” is correct as applied in this case, *i.e.*, that “extraordinary circumstances” are not present because the State Department failed to demonstrate facts showing some special inability to comply with the regulations’ timeliness requirements. We note that the expression “extraordinary circumstances” does not appear in the statutory text of Section 4(c) of the Act. Although the term – which is on its face ambiguous – appears in both the arm’s-length and substantial variance regulations, it is nowhere defined and therefore requires interpretation.

^{6/} Prior to establishment of the Administrative Review Board in 1996, the WAB issued final agency decisions on behalf of the Secretary of Labor under the Davis-Bacon Act, as amended, 40 U.S.C. §276a *et seq.* and various statutes incorporating Davis-Bacon Act requirements. The Davis-Bacon and its related Acts are “sister” statutes to the SCA, requiring payment of prevailing wages – as determined by the Secretary of Labor – to laborers and mechanics employed on federal and federally-assisted construction projects.

The Supreme Court has noted that a body reviewing an agency's application of a regulation

must give substantial deference to an agency's interpretation of its own regulations. . . . Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by *other indications of the Secretary's intent at the time of the regulation's promulgation.*"

Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (citations omitted; emphasis added); *accord*, *Paralyzed Veterans of America, et al. v. D.C. Arena L.P., a District of Columbia Limited Partnership, et al.*, 117 F.3d 579, 584-585 (D.C. Cir. 1997).

In this case, neither the parties nor the intervenors have directed the Board's attention to interpretive sources which provide insight to the Secretary's intended meaning of the expression "extraordinary circumstances" at the time the substantial variance or arm's-length hearings regulations were promulgated. Our own research has disclosed significant information in this regard.²⁷

Section 4(c) of the Service Contract Act, including the successorship provisions, the "arm's-length" language and the "substantial variance" proviso involved in this proceeding, was enacted in 1972. Soon afterward, problems in the administration of the Act were examined by the Wage and Hour Division and became the subject of regulatory action. Thus, in the early Spring, 1975, the Wage and Hour Division solicited public comments concerning the following perceived difficulty in administering Section 4(c):

Problems arising from the timing of collective bargaining agreements which create the "successorship" obligation; [sic] and from the timing of requests for hearings to determine whether such agreements are substantially at variance with wages prevailing in the locality of the place of performance have been arising frequently. In order not to delay the procurement process, a cut-off date [for submitting newly-negotiated labor agreements or for requesting substantial variance hearings] is proposed. This action

²⁷ As an aside, we note our disappointment in the Administrator's (and counsels') failure to discover and inform the Board of the history underlying this section of the SCA regulations.

will avoid serious disruption of the Government's business and disruption of collective bargaining.

40 Fed. Reg. 16082 (Apr. 9, 1975). The Wage and Hour Division proposed the following version of 29 C.F.R. §4.10 to remedy the perceived "timing" problem for requesting substantial variance hearings:

(a) Prerequisites for hearing.

*

(5) Pursuant to section 4(b) of the Act, requests for a [substantial variance] hearing shall not be considered unless received:

(i) for advertised contracts, prior to ten days before the opening of bids;

(ii) for negotiated contracts, prior to ten days before the award of the contract;

(iii) for contracts with provisions for extending the initial term by option, prior to the commencement of the follow-up option period. This has been found to be a reasonable limitation on the timing of such requests which is necessary and proper in the public interest.

Id. at 40 Fed. Reg. 16085.

Following the Wage and Hour Division's request for public comments on the proposed cut-off date for substantial variance hearing requests, Congressional hearings were conducted, in part to examine this conundrum of the appropriate time frames for negotiating collective bargaining agreements or for making hearing requests under Section 4(c) of the Act. Testifying on behalf of the Department of Labor before the House Subcommittee on Labor-Management Relations, Acting Administrator Warren Landis stated the problem in this manner:

The . . . problems involve timing These are last minute collective bargaining agreements entered into, changes in the collective bargaining agreements at the 11th hour right before bids are opened or right before negotiations are complete.

As under the Davis-Bacon Act for many years we have had a 10-day rule, it is proposed to apply this 10-day rule to new collective bargaining agreements for them to be operable under

4(c) and for changes in collective bargaining agreements *and also for the timing of requests for hearing under section 4(c) where some interested party complains that the collective bargaining agreement is substantially at variance with wages and fringe benefits otherwise prevailing in the locality.*

Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. On Education and Labor, 94th Cong., 1st Sess., p. 15 (emphasis added).

In the hearings before the Congressional subcommittee, testimony was also received from Stanley Gruber of the National Maritime Union, AFL-CIO. One of his concerns was that the Wage and Hour Division's proposed version of 29 C.F.R. §4.10 would "nullify the requirements of Section 4(c) . . . in cases where a wage determination based on a collective bargaining agreement is not received by the contracting agency at least 10 days before the opening of bids" *Id.* at 65. Another objection to the proposed 10-day rule was that given the vagaries of the procurement process and the lack of a requirement for notice to unions of contracting actions, the proposed regulation "appear[ed] to be designed for the convenience of the contracting agency, rather than to protect the employees of the government contractor." *Id.* at 72 (prepared statement of Richard E. Murphy, Assistant to the President and Legislative Director of the Service Employees International Union). With specific regard to requests for substantial variance hearings, several witnesses testifying on behalf of labor unions that were interested in filing such substantial variance challenges were concerned that employers and unions would not notify the Department, contracting agencies and other interested parties that a labor agreement had been negotiated until it literally would be too late to file a timely hearing request under the regulations. *See, e.g.*, testimony of Rudolph Oswald, Research Director of Service Employees International Union, *id.* at 74-75; prepared statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO, *id.* at 100.^{8/}

The concern of the Subcommittee and the witnesses was clearly focused on the question of how to implement a timing standard that would not disrupt the procurement process, while

^{8/} Although little remembered today, one of the problems that precipitated Section 4(c) and its substantial variance proviso was competition between employers *and unions* at Federal installations prior to 1972 that drove negotiated wage rates *downward*. In some instances, non-incumbent unions negotiated labor agreements with prospective (*i.e.*, non-incumbent) contractors at these installations with wage rates that were *below* the negotiated rates already being paid at the site under the union contract between the incumbent employer and the incumbent union. *See, e.g.*, *Dept. of the Air Force's Patrick AFB, FL*, SCA-CBV-3, Aug. 6, 1973. During the first years immediately following enactment of Section 4(c), several of the substantial variance hearings tried before Labor Department Administrative Law Judges were initiated by labor unions (or independent employee groups) asserting that the negotiated wage rates were *below* locally prevailing rates. *U.S. Air Force, Hawaii Tracking System, Kaena Point, Oahu, HA*, SCA-CBV-15, Oct. 18, 1977; *U.S. Air Force, Production Flight Test Installation, Palmdale, CA*, SCA-CBV-14, Aug. 19, 1975; *Dept. of the Navy, Point Mugu, CA*, SCA-CBV-4, Apr. 23, 1974.

at the same time insuring that a party seeking a substantial variance hearing would not be denied an opportunity for a hearing merely because an employer and union submitted a collective bargaining agreement at the very last minute before the time limitation in the proposed regulation ran out. In issuing the final version of 29 C.F.R. §4.10, the Wage and Hour Division took clear notice of the concerns evidenced by both Congress and the witnesses at the SCA oversight hearings of May 1975, and revised the language that had been proposed earlier. In publishing the final rule, the Wage and Hour Division noted that:

The proposal that requests for “substantially at variance” hearings under section 4(c) of the Act not be granted unless the request was received “prior to 10 days before the opening of bids” is modified by substituting “*prior to 10 days before the award of the contract except in those situations where the Administrator determines that extraordinary circumstances*” and as thus amended is adopted.

41 Fed. Reg. 5388 (Feb. 6, 1976). The final regulation as published contained the “extraordinary circumstances” exception to the timeliness requirement and also applied the general timeliness rule to contracts “with provisions extending the initial term by option ...” *Id.* In context, therefore, it is clear that the term “extraordinary circumstances” was added to the regulation specifically to address the problem of what might be called the “11th hour contract” – that is, a labor agreement announced so close to the deadline for requesting a substantial variance hearing that an interested party that might want to challenge the agreement lacked adequate information within sufficient time to submit a timely hearing request.

Although the 1975 SCA regulations addressed the *substantial variance* hearing process, they did not include a mechanism for investigating whether collective bargaining agreements were reached as the result of *arm’s-length negotiations*. Our research shows that the current version of the arm’s-length hearing regulation was adopted as a final rule in 1983, after a lengthy history of proposals, comments, and suspensions spanning the years 1979 to 1981.^{9/} See 48 Fed. Reg. 49736, 49740-41 (Oct. 27, 1983). The time limitations framework from the earlier substantial variance hearing regulation was adopted *en toto* and applied to the arm’s-length hearing procedure, including the provision authorizing the Administrator to order arm’s-length hearings in “extraordinary circumstances” even if the hearing request was untimely. No comments were received from the public with respect to the “extraordinary circumstances” language in the arm’s-length negotiation provision; instead, comments on the arm’s-length negotiations hearing regulation were limited to objections to the Labor Department’s original proposed standards for establishing what an arm’s-length determination itself would entail.^{10/}

^{9/} The activities during the period from 1979 to 1983 concerned a comprehensive revision of all the regulations applicable to the SCA (29 C.F.R. Part 4), and not just the substantial variance or arm’s-length hearing regulations.

^{10/} Commenters were concerned that the Labor Department might adopt “arm’s-length” standards (continued...)

Thus, the Board is presented with a situation in which the ambiguous term “extraordinary circumstances” in the SCA regulations can be understood by referring to agency statements contemporaneous with the rule’s publication. The Wage and Hour Division was concerned with the overall question of establishing timeliness requirements for substantial variance hearings which would not impede the procurement process and at the same time would facilitate the SCA’s goal of giving effect to collectively bargained wage and fringe benefit rates where available. In direct response to concerns raised by the labor unions in testimony before the Congress expressing concern that they might be unable to file requests for substantial variance hearings if collective bargaining agreements were submitted immediately before the Administrator’s proposed cut-off date, the Administrator modified the regulation to give himself discretion to approve an untimely hearing request in “extraordinary circumstances.” Thus, it is apparent that the term primarily is a reference to *time constraints* under which a substantial variance hearing request under 29 C.F.R. §4.10 is made, and not a reference to the underlying *merits* of the challenged wage rate. Because the same time limitation language developed for the substantial variance hearing requests was adopted for arm’s-length hearings, without substantive comment, we conclude that the term “extraordinary circumstances” has the same meaning under 29 C.F.R. §4.11.

We also note that the State Department’s merits-based argument concerning what circumstances might be viewed as “extraordinary circumstances” previously has been rejected in an SCA case which presented a similar question to that raised here. In *Systems Engineering Associates Corp. (SEACOR)*, Case No. 87-SCA-OM-3, Dep. Sec.^{11/} Dec., July 26, 1988, SEACOR (the petitioner) – a successor contractor subject to SCA labor standards provisions – requested an arm’s-length negotiation hearing more than one and one-half years after the regulatory time restriction. SEACOR argued that the CBA entered by the predecessor contractor had not been negotiated at arm’s-length, citing findings concerning the CBA negotiations contained in a SEACOR-instigated unfair labor practices investigation conducted by the NLRB.^{12/}

In *SEACOR*, the petitioner and the Administrator apparently concentrated their arguments on whether certain NLRB findings – specifically that the CBA had been entered

^{10/}(...continued)

similar to the standards of “good faith bargaining” under the National Labor Relations Act. In the face of opposition, the Labor Department dropped this proposed interpretation.

^{11/} Prior to the establishment of the Administrative Review Board, SCA final decisions were issued by the Board of Service Contract Appeals (BSCA)(1992–1996). Before the BSCA was created, final decisions under the Act were rendered by the Deputy Secretary of Labor.

^{12/} The NLRB ultimately denied SEACOR’s unfair labor practices charge. See *SEACOR, supra*, slip op. at p. 4.

into prematurely and with some measure of collusion between the parties – could have been discovered prior to the award of the SEACOR contract. If so, argued the Administrator, the NLRB information could not be considered to be newly discovered evidence and therefore constitute extraordinary circumstances sufficient to waive the hearing request timeliness requirement. The Deputy Secretary rejected this approach, stating: “It appears that the Administrator, the Administrator’s counsel, and the Petitioner have confused the question of whether there are ‘extraordinary circumstances’ sufficient to warrant consideration of Petitioner’s untimely hearing request with the merits of the claims which Petitioner seeks to have heard.” *Id.* at 5. Thus, the Deputy Secretary concluded that the existence or non-existence of extraordinary circumstances did not encompass consideration of the alleged merits of whether arm’s-length negotiations actually occurred. The Deputy Secretary, finding no other record indicia of extraordinary circumstances outside the alleged merits of the case, denied SEACOR’s petition for review.

Like the Deputy Secretary in *SEACOR*, we disagree with a merits-based analysis and conclude that the proper focus in determining whether the Administrator erred when refusing to order hearings in this case is whether extraordinary factual circumstances prevented the State Department from filing its hearing requests in a timely fashion, a position which is consistent with the Congressional oversight hearings and the regulatory history and interpretation of the substantial variance regulation.

B. *Whether the State Department’s untimely hearing request was justified*

The State Department asserts that no party would be prejudiced if the Administrator ordered the hearings in response to the State Department’s out-of-time requests. However, the question of prejudice is not central to this issue. The underlying goal of the time limitations in the regulations is to insure efficiency and certainty in the procurement process. We view Petitioner’s failure to timely request hearings as being due to mere neglect of the regulatory requirements. In fact, the State Department has acknowledged in its own pleadings that its failure to file timely requests was due to its own choice: “The Department of State had the choice of submitting timely requests for substantial variance hearing [sic] and or arm’s length bargaining determination without supporting evidence.” Pet’r Rep. Brf., p. 6. To the contrary, our discussion, below, of the supporting information required for making these hearing requests demonstrates that all necessary information was within the State Department’s control and the record shows no circumstances which prevented the State Department from complying with the timeliness requirements of the Act’s hearing regulations. Thus, in this case, it is clear that the State Department either had sufficient information – or had access to such information – which would have allowed for the timely filing of its requests for both the substantial variance and arm’s-length negotiation hearings. The regulatory requirements which specify the information necessary to support such requests do not establish onerous standards.

A request for a substantial variance hearing must be made in writing and directed to the Administrator. The hearing request must include the number of the wage determination, the name of the contracting agency, and a brief description of the services involved under the contract. 29 C.F.R. §4.10(b)(1)(i)(A). Further, the regulations require that a party requesting a substantial variance hearing provide “a statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, commencement date of the contract or its follow-up option period. . . .” 29 C.F.R. §4.10(b)(1)(i)(B). The State Department clearly possessed all of this information and could have submitted it in a timely request for a hearing. Also required to support a substantial variance hearing request is a “statement of the applicant’s case, setting forth in detail the reasons why the applicant believes that a substantial variance exists with respect to some or all of the wages and/or fringe benefits, attaching available data concerning wages and/or fringe benefits prevailing in the locality.” 29 C.F.R. §4.10(b)(1)(i)(C). This information also could have been timely submitted by the State Department; the Contract wage determination itself and a comparison to the CBA wage and fringe benefit rates might well have sufficed. However, additional publicly available information, such as wage information compiled for the various localities by the Department of Labor’s Bureau of Labor Statistics could have provided readily available support for the substantial variance hearing request. Finally, the names and addresses of all interested parties (“to the extent known”) must accompany substantial variance hearing requests. 29 C.F.R. §4.10(b)(1)(i)(D). Again, the State Department had access to the information concerning both the contractor and the union which negotiated the CBA. With all of this information available – at the very latest by December 16, 1997 (three weeks prior to the start of the option year) – the State Department’s failure to timely request a hearing can only be seen as neglect of the requirement to adhere to the timeliness standard of the regulation.

The information required to support an arm’s-length negotiation hearing request is found at 29 C.F.R. §4.11(b) and is even less burdensome than the information required to document a substantial variance hearing request. This regulation merely requires a detailed statement of the reasons an applicant believes that CBA wage and fringe benefit rates were not negotiated at arm’s-length; a statement regarding the status of the procurement; and information regarding the interested parties. 29 C.F.R. §4.11(b)(1)(i), (ii), (iii). Once more, it is clear that all of this information was in the State Department’s possession no later than December 16, 1997. Petitioner therefore could have filed a request for an arm’s-length hearing well within the time requirement of the regulation.

For the reasons stated above, we find that the Administrator’s final ruling, declining to order arm’s-length or substantial variance hearings in response to the State Department’s untimely hearing requests, is in accordance with the controlling SCA regulations and is reasonable.

II. Disposition of Intervenor Inter-Con’s pending Motion to Strike

We next address Inter-Con's Motion to strike the State Department's supplemental materials relating to the NLRB proceeding. UPGWA has joined in this motion.

Inter-Con requests that the Board strike portions of the State Department's Reply Brief which are "immaterial" to this proceeding or which include "material outside the administrative record in this appeal." Motion, p. 1. Specifically, this portion of the Motion refers to statements in the Reply Brief and certain attachments thereto which indicate that after the Petition for Review was filed, Inter-Con entered into a settlement agreement with the National Labor Relations Board under which Inter-Con agreed, *inter alia*, to give no effect to the CBA originally entered by Inter-Con and UPGWA on December 5, 1997.^{13/}

These allegations and attachments contained in the State Department's Reply Brief had not been before the Administrator during the Wage and Hour Division's deliberations prior to issuance of the March 24, 1998 final ruling in this matter. The Board's review of the Administrator's rulings is in the nature of an appellate proceeding, and we generally focus our attention on the formal administrative record in this case, *i.e.*, the materials that were before the Administrator. 29 C.F.R. §8.1(d)(1998); *Harbert International, Inc.*, Case No. 91-SCA-OM-5, Sec. Dec., May 5, 1992, slip op. at 6; *see also COBRO Corporation, supra*, slip op. at 12 and n.10; *Jeanette M. Bailey, An Individual d/b/a B&W Trucking, and Paul Wilson, an Individual*, BSCA Case No. 94-03, July 29, 1994, slip op. at 14 ("the Board is an appellate body and does not review evidence *de novo*"). To the extent that we consider materials submitted for the first time on appeal, our primary concern in reviewing them is to determine whether they raise relevant questions of fact that should be considered by the Administrator as part of a remand for reconsideration. *Dept. of the Army*, ARB Case No. 98-120, 98-121 and 98-122, Dec. 20, 1999, slip op. at 11-12 n.10; *COBRO Corporation, supra*.

In the State Department's extra-record submissions to this Board, Petitioner argues that the information has a bearing on the Administrator's refusal to find "extraordinary circumstances" and therefore should be considered as supporting the grant of the requested hearings pursuant to Section 4(c) of the SCA. In the interest of administrative efficiency, we have reviewed the exhibits and the accompanying arguments in the State Department's Reply Brief in order to determine whether any of this information should be considered by the Administrator. *Cf. Mercury Consolidated, Inc.*, Case No. 88-SCA-OM-2, Dep. Sec. Dec., Mar. 23, 1988, slip op. at 2 (remanding to Administrator for review of evidence not previously available that was submitted on appeal).

^{13/} The settlement was made in response to a charge of unfair labor practices stemming from the allegation that at the time the CBA was entered, a majority of employee signature cards authorizing UPGWA to be Inter-Con's employees' collective bargaining representative had not been obtained. Pet'r Rep. Brf., Attachment 3.

Given our reasoning in affirming the Administrator's ruling, *supra*, we conclude that none of the arguments or exhibits submitted directly to the Board with the State Department's Reply Brief require consideration by the Wage and Hour Division in connection with the Administrator's denial of the Petitioner's untimely requests for hearings. Accordingly, we will not remand this matter to the Administrator for consideration of the information concerning the NLRB settlement and regarding the Inter-Con/UPGWA labor agreement.

In reaching our conclusion that the Administrator does not need to review this documentation concerning the validity of the CBA, we consider several factors to be of key importance. In the first place, as discussed above, we concur with the Administrator's view that the "extraordinary circumstances" waiver provision refers only to situations where there was insufficient or no time in which to file a timely hearing request, and not to the underlying merits of the arm's-length negotiation or substantial variance questions themselves. In the second place, we have concluded that the State Department had ample time in which to file the requests for hearings in a timely manner, but failed to do so. Finally, the fact that there is a cloud on the legitimacy of the CBA – although very troubling to the Board^{14/} – has no bearing on the issues of timeliness and "extraordinary circumstances" issue before us. Therefore, we conclude that there is no need to remand the case to the Administrator for further review in order to consider the new materials.

Second, Inter-Con objects to the State Department's request that the Board direct the Administrator to revoke the wage determination which was based on the wage rates and fringe benefits contained in the Inter-Con/UPGWA CBA. The propriety of this wage determination is an issue which was not raised before the Administrator or decided by him pursuant to the Review and Reconsideration procedures found at 29 C.F.R. §4.56. Because the Board acts in the nature of an appellate review body, we decline to reach this question presented by the State Department because the issue had not previously been raised before and decided by the Administrator. *SEACOR*, Case No. 86-SCA-OM-2, Dep. Sec. Dec., Jan. 12, 1988, slip op. at 2 ("The jurisdiction of the Deputy Secretary, acting in lieu of the Board of Service Contract Appeals, is limited to hearing and deciding 'in [his] discretion appeals concerning questions of law and fact from *final decisions* of the Administrator of the Wage and Hour Division. . . ." (Emphasis added.) *See also Island Movers, Inc.*, BSCA Case No. 92-29, Oct. 30, 1992, slip op. at 4 (in reviewing an administrative law judge's decision, "as an appellate body it is not appropriate to decide matters not raised in the proceedings below.")). Accordingly, Inter-Con's and UPGWA's Motion to Strike the State Department's materials relating to the NLRB proceeding is **GRANTED**.

^{14/} Although we express no opinion in this case in which there has been a premature recognition of a union and the lawfulness of the negotiated CBA is in question, such facts could present significant considerations at trial where a *timely challenge* to a CBA is presented.

CONCLUSION

For the foregoing reasons, the State Department's Petition for Review is **DENIED** and the Administrator's final ruling letter of March 24, 1998 is **AFFIRMED**.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member